THE

-QUARTERLY REVIEW-

LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

July 2002 Vol. 3, Ed. 4

EDITOR'S COMMENTS

Welcome to the fourth installment of Volume 3 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. The QR is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding the QR can be directed to Robert Cauthen at (912) 267-2179 or rcauthen@fletc.treas.gov. Should you wish to join the QR Mailing List and have the QR delivered directly to you via electronic mail attachment, please provide your current e-mail address to Mr. Cauthen. Copies of the current and past issues of the QR can be viewed by visiting the Legal Division web page at: http://www.fletc.gov/legal/legal_home.htm. This volume of the QR may be cited as "3 QUART. REV. ed. 4 (2002)".

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Special thanks go to the following members of the Legal Division who voluntarily contributed to The Quarterly Review.
Holly Coffey Jim Coppage Jeff Fluck
Carl Milazzo Stephen Happeny (Legal Intern)

WARRANTLESS WORKPLACE SEARCHES OF GOVERNMENT EMPLOYEES
PART II

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Part I of this article discussed different factors to consider when deciding whether a government employee has a reasonable expectation of privacy in a government "workplace."[1] If no expectation of privacy exists, the Fourth Amendment is not implicated.[2] However, government employees can, and often do, establish expectations of privacy in their government offices, desks, computers, and filing cabinets.[3] Part II of this article examines the ways in which a government supervisor may defeat a government employee's expectation of privacy in a government workplace.

II. IF A REASONABLE EXPECTATION OF PRIVACY DOES EXIST, HOW CAN THAT EXPECTATION BE DEFEATED?

"The Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer."[4] If a reasonable expectation of privacy exists in the workplace, the courts will scrutinize the motivations behind the supervisor's search to determine if the warrantless search is valid. "The 'special needs' of public employers may … allow them to dispense with probable cause and warrant requirements when conducting workplace searches related to investigations of work-related misconduct."[5] As noted by the Supreme Court:

"In our view, requiring an employer to obtain a warrant whenever the employer wished to

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[1] "Workplace," as used in this article, "includes those areas and items that are related to work and are generally within the employer's control." *O'Connor v. Ortega*, 480 U.S. 709, 715 (plurality opinion). This would generally include such areas as offices, desks, filing cabinets, and computers. However, "not everything that passes through the confines of the business address can be considered part of the workplace context." *Id*. at 716. A government employee would continue to have an expectation of privacy in his or her personal belongings that might have been brought into the workplace environment. Thus, "the appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address." *Id*.

[2] *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant clause").

[3] *See, e.g., McGregor v. Greer*, 748 F. Supp. 881, 888 (D.D.C. 1990)(Reiterating *O'Connor's* holding that "a government employee may be entitled to a reasonable expectation of privacy in her office").

[4] *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989)

[5] *Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001)(citation omitted). *See also United States v. Reilly*, 2002 U.S. Dist. LEXIS 9865, 9875 (S.D.N.Y. 2002)("Although the Fourth Amendment generally requires a warrant and probable cause, there are some well-established exceptions to these requirements. One such exception applies to the government's interest in the efficient and proper operation of a government workplace").

> enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable."[6]

Thus, the motivation behind the search of the employee's workplace is key to determining the standard required. In *O'Connor*, the Supreme Court outlined two basic categories of workplace searches: (1) Searches for work-related, non-investigatory purposes, and (2) searches for evidence of criminal violations.

A. SEARCHES FOR WORK-RELATED, NON-INVESTIGATORY PURPOSES

When a search of a government employee's workplace is conducted for a work-related, non-investigatory purpose, such as retrieving a needed file or investigating work-related misconduct, the search must be reasonable based on the totality of the circumstances.[7] This standard requires both that the search be reasonable at its inception and that the scope of the search made also be reasonable. As noted by the Supreme Court:

> "Ordinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory, work-related purpose, such as to retrieve a needed file."[8]

Additionally, a search will be "permissible in scope" when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of … the nature of the [misconduct]."[9]

B. SEARCHES FOR EVIDENCE OF CRIMINAL VIOLATIONS

In *O'Connor*, the Supreme Court "specifically declined to 'address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related or regulatory standards.'"[10] Nonetheless, "the distinction between searches and seizures for purpose of criminal prosecution and those undertaken for work-related or administrative purposes is critical and many courts upholding a standard lower than probable cause have recognized the lower standard is not appropriate in the criminal arena."[11] "Accordingly, in the criminal context, the appropriate standard for searches and seizures involving work-related misconduct is probable cause."[12] Where the sole motivation

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[6] *O'Connor*, 480 U.S. at 722 (plurality)
[7] *Id*. at 725, 726 (plurality)
[8] *O'Connor*, 480 U.S. at 726 (plurality)
[9] *Id*. (plurality)
[10] *United States v. Slanina*, 2002 U.S. App. LEXIS 2611 (5th Cir. 2002)
[11] *Cerrone v. Cahill*, 84 F. Supp. 2d 330, 336 (N.D.N.Y. 2000). *See also United States v. Taketa*, 923 F.2d 665, 675 (9th Cir. 1991)("The rationale for the lesser burden *O'Connor* places on public employers is not applicable for federal agents engaged in a criminal investigation. The DEA cannot cloak itself in its public employer robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution").
[12] *Id*. at 337

behind the search is to uncover evidence of criminal wrongdoing, "the traditional requirements of probable cause and warrant are applicable."[13]

C. "MIXED MOTIVE" SEARCHES

While the standards set out above appear relatively clear, there are often situations in which a government employee's misconduct might well fit into both of the above categories. In other words, the employee is engaged in administrative misconduct that is also criminal in nature. "The courts have adopted fairly generous interpretations of *O'Connor* when confronted with mixed-motive searches."[14] For example, in *United States v. Reilly*,[15] the defendant was accessing child pornography from his government computer, a clear violation of the Department of Labor's computer use policy. Two diskettes were seized from the defendant, both of which were later found to contain child pornography. His motion to suppress the two diskettes was denied. The court found the search of these diskettes fell within *O'Connor's* "work-related misconduct" exception: "Agent Wager's dual role as an investigator of workplace misfeasance and criminal activity does not invalidate the otherwise legitimate workplace search."[16]

Similarly, in *United States v. Simons*,[17] the court upheld a search of a government employee's office even "assum[ing] that the dominant purpose of the warrantless search of Simons' office was to acquire evidence of criminal activity."[18]

> "Nevertheless, the search remains within the *O'Connor* exception to the warrant requirement; FBIS did not lose its special need for 'the efficient and proper operation of the workplace,' merely because the evidence obtained was evidence of a crime. Simons' violation of FBIS' Internet policy happened also to be a violation of criminal law; this does not mean that FBIS lost the capacity and interests of an employer."[19]

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[13] *Id*. at 336 (citation omitted)
[14] *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice at 45 (March 2001)
[15] *Supra* at note 5
[16] *Id*. at 9881
[17] 206 F.3d 392 (4th Cir. 2000), *cert. denied*, 122 S. Ct. 292 (2001)
[18] *Id*. at 400
[19] *Id*. (internal quotations and citations omitted)

PROTECTIVE SWEEPS and ARREST SEARCHES
The Legacy of *Maryland v. Buie*[1]
PART 2

Dean Hawkins
Senior Instructor

As Part 1 of this series of articles demonstrated, *Buie* provides new tools for law enforcement, i.e. protective sweeps and searches incident to arrest. Part 2 reviews cases which did not comply with the *Buie* requirements.

The *Buie* case held that before police officers may conduct a protective sweep, they must have reasonable suspicion that the area to be swept harbors a person presenting a danger to them. Protective sweeps are analogized to the "on the street 'frisk' for weapons"[2] and the "'frisk' of an automobile for weapons"[3] and as such, the "reasonable suspicion" standard is applicable. If reasonable suspicion is not present, the protective sweep violates the 4th Amendment.

CASE EXAMPLES INVOLVING PROTECTIVE SWEEPS NOT COMPLYING WITH *BUIE*

A warrantless entry into a warehouse could not be justified when there was a lack of specific and articulable facts of the presence of another individual who posed a danger to the officers.

In *U.S. v. Chaves*[4], agents of the Drug Enforcement Administration ("DEA") received information from a confidential informant relating to drug trafficking in Miami, Florida. Based on the information provided, the DEA developed a plan to seize approximately 240 kilograms of cocaine using the informant's van. The informant was to provide the keys to the van to a third person, who would then pick up the drugs and return with the van. DEA agents saw Frank Chaves drive off in the informant's van. Using both car and helicopter, the DEA surveilled the van. Chaves stopped at a warehouse and departed a short time thereafter. Chaves then drove the van to a restaurant and entered. While Chaves was in the restaurant, a DEA agent approached the van and saw several boxes in an area that was previously empty. DEA agents then proceeded to arrest Chaves and search the van, seizing ten boxes containing 240 kilograms of cocaine, some money, and keys belonging to Chaves.

Shortly after arresting Chaves, DEA agents, who were still surveiling the warehouse, arrested Rafael Garcia and John Torres as they exited the warehouse. Both men were carrying firearms at the time of their arrest. The door of the warehouse was locked and none of the keys taken from Garcia and Torres could open the warehouse. The agents at the warehouse then waited approximately forty-five minutes outside the warehouse with Garcia and Torres in custody. At this time, the agents at the warehouse, who had been joined by those arresting Chaves, conducted a warrantless entry of the warehouse. During the sweep of the warehouse, which lasted approximately five to ten minutes, the agents saw boxes similar to those found in the van.

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[1] *Maryland v. Buie*, 494 U.S. 325 (1990)
[2] *Terry v. Ohio*, 391 U.S. 1 (1968)
[3] *Michigan v. Long*, 463 U.S. 1032 (1983)
[4] *U.S. v. Chaves*, 169 F.3d 687 (11th Cir. 1999)

At this point, agents drafted a search warrant affidavit, relying on information obtained both before and as a result of the warrantless entry. Late that same evening, agents obtained and executed the search warrant for the warehouse. As a result of the execution of the warrant, DEA agents found approximately 400 kilograms of cocaine, as well as packaging material, boxes, gloves and items belonging to Chaves.

On appeal, both Chaves and Garcia argued that the search of the van and the warrantless entry at the warehouse violated their Fourth Amendment rights and, therefore, their motions to suppress the cocaine seized from the van and at the warehouse should have been granted.

The court sustained the search of the van as to both Chaves and Garcia. Chaves, on the other hand, did have a reasonable expectation of privacy in the warehouse.

The court held that the initial warrantless entry of the warehouse under the auspices of conducting a "protective sweep" violated the Fourth Amendment. *Buie* held that a properly limited protective sweep, conducted incident to an arrest, is permitted under the Fourth Amendment only "when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[5] The Court in *Buie* permitted police officers to undertake protective sweeps in these instances because of the compelling "interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack."[6]

Here, the government's own action undermines any claim that the entry had a protective purpose. It is undisputed that the sweep in this case did not immediately follow the arrest of Garcia and Torres outside the locked warehouse, but occurred a substantial time afterward. During the interim period, approximately forty-five minutes, the officers simply sat in their cars outside the warehouse. The agents, thus, saw no immediate need to enter the warehouse to protect themselves or other persons in the area. *Buie* requires officers to have "a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission."

Moreover, the government has failed to point to any "specific and articulable" facts that would lead a reasonably prudent officer to believe that, at the time of the sweep, a sweep was necessary for protective purposes. Much of the government's argument as to why a sweep was needed for protective purposes is not based on any specific facts in the government's possession, but rather is based on the lack of information in the government's possession. The testimony at the suppression hearing indicated that the officers had no information regarding the inside of the warehouse. Not knowing that there is not another individual who poses a danger to the officers or others cannot justify a protective sweep.

The fact that Garcia and Torres were arrested with weapons in their possession "implies nothing regarding the possible presence of anyone being in [the warehouse] - the touchstone of the protective sweep analysis."

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[5] *Buie* at 337
[6] *Buie* at 333

Note, however, that the court found the search warrant to be valid, stating that "even discounting that portion of the affidavit describing information uncovered during the unconstitutional warrantless entry, the balance of the affidavit supports a finding of probable cause."

A protective sweep may last no longer than it takes to complete the arrest and depart the premises. Where there is no arrest, and no facts demonstrate that a reasonably prudent officer would have believed that the apartment harbored another individual posing a danger to those on the scene, there can be no protective sweep under *Buie*.

In *U.S. v. Reid*[7], while searching for a suspect, U.S. Marshals learned that a man named Mikey, one of the suspect's close associates, lived in an apartment in San Diego, California. Federal agents went to the apartment to speak with Mikey. The agents did not have a search warrant or an arrest warrant. Deputy Marshal Kitts knocked on the door, which was answered by Junior Grant. Kitts knew that Grant was not Mikey. Kitts asked Grant if he knew who owned the Lexus in the parking space for the apartment. Grant said he did not know. Kitts could smell burning marijuana through the open door. When Kitts identified himself as a federal agent, Grant closed the door and was observed by other agents running from the back door of the apartment.

Two agents detained Grant and frisked him. Kitts handcuffed Grant and told him that he was not under arrest. Kitts did not hear any sounds suggesting that other individuals were in the apartment.

The officers entered the apartment and observed items they believed to be associated with drug trafficking. While a search warrant was being prepared, appellant Wayne Blake attempted to enter the apartment. When questioned, he gave one of the agents his wallet. The agent found a false identification in the wallet and arrested Blake. An hour later, appellant Lawrence Reid entered the apartment and encountered the officers inside. Reid fled and was apprehended. He also presented a false identification and was arrested.

The search warrant was executed a few hours later. Officers found weapons, another false identification with Reid's picture on it, packing and shipping materials, a scale, marijuana residue and large amounts of cash in the apartment.

Blake and Reid appealed their convictions, arguing that the warrantless search of the apartment violated the Fourth Amendment. The government argued that the search was permissible either as a protective sweep or because of exigent circumstances.

The court held that the warrantless search was neither a protective sweep nor justified by exigent circumstances.

Citing *Buie*, the court noted that "[a] protective sweep may last 'no longer than it takes to complete the arrest and depart the premises'". In the present case, Deputy Kitts testified that when the officers detained Grant in the back of the apartment, Grant was not under arrest. Additionally, the government did not point to any facts that demonstrated that a reasonably prudent officer would have believed that the

[7] *U.S. v. Reid*, 226 F.3d 1020 (9th Cir. 2000)

apartment "harbor[ed] an individual posing a danger to those on the arrest scene." The officers did not have any information that Grant or anyone possibly inside the apartment was violent. The officers did not see any guns and Grant cooperated with the officers when he was detained outside. Therefore, the officers were not entitled to conduct a protective sweep under *Buie*.

As to exigent circumstances, the smell of burning marijuana cannot satisfy the burden that the government must overcome because one person can smoke marijuana alone. Since that person was detained, there was no risk that he could destroy evidence. Similarly, the fact that the Lexus was parked in the parking space for apartment 101, standing alone, is insufficient to establish exigent circumstances. Other than the two facts offered by the government, there was no evidence that other persons were inside the apartment. Deputy Kitts testified that he did not hear anything that indicated that another person was inside the apartment. And when Grant was detained at the back of the apartment he told the officers that there was no one else inside.

Arrest outside the residence, sweep inside the residence requires reasonable suspicion.

In *U.S. v. Calhoun*[8], the court dealt with an arrest outside an apartment with a subsequent protective sweep inside the apartment.

The police intercepted a kilogram of cocaine when a United Parcel Service ("UPS") employee opened a package addressed to "Sean Johnson." The police arranged for the controlled delivery of the package to Sean Johnson at the address indicated on the shipping label. When the delivery was made, Kendra Calhoun opened the door, identified herself as Sean Johnson, signed for the package, and took possession of it. She was immediately arrested and placed in handcuffs. By pre-arranged plan, other officers entered the apartment and conducted a "sweep." They had no prior knowledge anyone was inside. They found two men and an infant. The officers had neither an arrest nor a search warrant.

After having received her *Miranda* rights, Calhoun was given a consent form to sign so the police could search her apartment. She signed it. Asked whether any weapons were in the apartment, Calhoun told the officers a shotgun was under the bed. The officers retrieved the gun. They also seized various documents, including cash receipts for many items of value in the apartment and UPS forms.

Calhoun's motion to suppress the weapon, the statements she made to police, and various documents found in the apartment was denied. She claims this was error because the pre-arranged sweep was unconstitutional under *Buie*. Although the sweep did not lead to the discovery of any evidence, she contends it was instrumental in causing her to consent to the search and to make the statements she sought to suppress.

The court agreed with Calhoun that the sweep of her apartment was illegal. However, the evidence seized did not turn on the unauthorized sweep. The district court's finding that Calhoun's consent was voluntary is not clearly erroneous. Her consent made the subsequent warrantless search of her apartment lawful.

[8] *U.S. v. Calhoun*, 49 F.3d 231 (6th Cir. 1995)

A protective sweep under *Buie* is defined as "a quick and limited search of premises . . . . It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." It does not include a search of a box of business records.

The case of *U.S. v. Noushfar*[9] involves a conspiracy to smuggle valuable Persian rugs into the United States in violation of an Executive Order.

Kamran Shayesteh and his wife Zohreh owned and managed the Galleria deFarsh, a large rug store in Burlingame, California. In 1987, a presidential order imposed an embargo on virtually all Iranian goods. The embargo prevented importation of Iranian products, but did not prevent ownership. The restriction created a sudden increase in demand and in price for the limited supply of Persian (Iranian) rugs already in the United States.

The Shayestehs conspired with others to smuggle Persian rugs from Canada, where they could be legally imported, to California. The conspiracy worked more or less as follows: The Shayestehs, with the assistance of Rabie, imported Iranian rugs from Tehran to Vancouver, often via Singapore, Hong Kong or Malaysia. The rugs were then smuggled into the United States by drivers who failed to declare the rugs or else lied about their origin.

During three smuggling operations, the defendants were assisted by Tim Meyer, an undercover United States Customs agent, whom the Shayestehs hired to drive a truck filled with contraband rugs over the border. When the rugs entered Washington state, customs officials documented them and marked them with an invisible thread. The rugs were delivered to Noushfar in Seattle, and he sent them to the Galleria in California.

The investigation eventually led to the arrest of the Shayestehs by customs agents who then undertook a sweep of their apartment. Agents testified that they arrested the Shayestehs within a minute of entering the apartment. Instead of leaving promptly, they made the Shayestehs sit in their living room while the agents went through the apartment for more than a half-hour. During this period, they spotted a box with business receipts in a closet. Thereafter, other agents returned to the closet to examine the box further. There was no suggestion that the agents feared for their safety. Even if the box had been in "plain view," the further examination exceeded the narrow purpose of a *Buie* sweep.

The court held that the "sweep" by the seven customs agents exceeded the limits of a *Buie* sweep in both time and scope.

Conclusion

As these cases illustrate, a protective sweep of a premises is a search under the 4th Amendment that is analogous to a "*Terry* frisk" in that it requires reasonable suspicion to believe that the premises harbors a person who is a danger to those on the arrest site. The scope of the protective sweep is limited to a cursory inspection of those places in which a person might be hiding.

[9] *U.S. v. Noushfar,* 78 F.3d 1442 (9th Cir. 1996)

Part 3 of this article, dealing with the search incident to arrest aspects of *Buie* will appear in the October, 2002, edition of *The Quarterly Review*.

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CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

U.S. v. Drayton
122 S.Ct. 2105
June 17, 2002

SUMMARY: Officers do not violate the Fourth Amendment by merely approaching individuals and asking them questions as long as a reasonable person under the same circumstances would feel free to end the encounter. Whether consent to search a person or luggage on a bus is voluntary depends upon the totality of the circumstances. Officers do not necessarily have to inform passengers of their right to refuse consent, although that is one factor that a court will consider under the totality of the circumstance test.

FACTS: Three plainclothes Tallahassee police officers performed a routine search of a Greyhound bus bound for Detroit after passengers re-boarded the bus during a scheduled stop. Officer Hoover remained kneeling on the driver seat facing the rear of the bus, while Officer Blackburn remained at the rear of the bus facing the front. Neither officer blocked any of the exits. A third officer, Lang, conducted the search by moving from the back of the bus to the front of the bus. Officer Lang was careful not to block the aisle while conducting the search. He stood next to or just behind each passenger with whom he spoke.

Officer Lang approached respondents Christopher Drayton and Clifton Brown, Jr., who were traveling together and seated next to each other. Officer Lang introduced himself and explained his purpose for being on the bus. He asked Drayton and Brown if they had any luggage, and they both pointed to a single green bag. Lang asked if he could search the bag, and Brown consented. The search revealed nothing. Then, Lang, who had noticed that Brown and Drayton were wearing heavy, baggy clothes, despite the warm weather, asked if he could search Brown's person. Brown consented, and the subsequent search revealed packages taped to Brown's inner thighs. Brown was arrested. Next, Lang asked Drayton if he could search him as well. Drayton consented, and the subsequent search also revealed similar packages. Drayton was arrested. The packages turned out to be bundles of cocaine, totaling more than 750 grams.

ISSUES: (1) Must police officers inform bus passengers of their right to refuse to cooperate when officers conduct a search of the bus, luggage, and persons on board?

(2) Were the defendants seized?

(3) Was the consent to search voluntary?

HELD: (1) No.

(2) No.

(3) Yes.

DISCUSSION: In arriving at its decision, the Supreme Court looked at *Florida v. Bostick*, 501 U.S. 429 (1991). In *Bostick*, the Court reversed a Florida Supreme Court decision, which had created a per se rule that a person is deprived of Fourth Amendment rights when officers question that person within the cramped confines of a bus. *Bostick* held that "per se" rules are not appropriate in the Fourth Amendment context. Rather, courts should examine the totality of the circumstances of each case. *Bostick* also held that when analyzing this type of situation, courts should consider whether a reasonable person would feel comfortable declining the officer's request or terminating the encounter all together.

Relying heavily upon *Bostick*, the Eleventh Circuit Court of Appeals decided *U.S. v. Guapi*, 144 F.3d 1393 (1998). In *Guapi*, the Court of Appeals ruled that unless an officer informs a passenger of the right to refuse cooperation, then all evidence must be suppressed. The Eleventh Circuit followed the *Guapi* decision with a similar ruling in *U.S. v. Washington*, 151 F.3d 1354 (1998).

The Court, here, distinguished the facts of *Guapi*, *Washington*, and the current case. In *Guapi*, the officers stopped passengers before they disembarked the bus; the officer announced to the entire bus his purpose for being there; the officer wore his police uniform; and the officer questioned the passengers from the front of the bus to the rear of the bus and blocked the path to the exit. In *Washington* and the current case, however, the facts were much different. The officers conducted interdiction after the passengers re-boarded the bus; the officer spoke to each passenger individually about his purpose rather than announcing it to the whole bus; the officers wore plainclothes; and the officers moved from the rear of the bus to the front of the bus and did not block the path to the exit. The Court noted that the only factor shared by all of these cases was that the officers did not inform the passengers of their right to refuse to cooperate.

Analyzing this case under a totality of the circumstances test, the officers did not violate the Fourth Amendment. The cocaine evidence should not be suppressed merely because the officers failed to inform the passengers of their right to refuse consent. The Court also relied heavily on the testimony of Officer Lang, who stated that often times during these types of searches passengers have left the bus to smoke cigarettes or get a snack. Furthermore, Officer Lang stated that a significant proportion of bus passengers cooperate with officers not out of coercion, but rather for their own safety and the safety of others.

Because a reasonable person in Brown and Drayton's position would have felt free to terminate the

encounter, no seizure took place. Considering all of these factors together, the Court held that a reasonable search took place, and the consent was voluntary.

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1st CIRCUIT

U.S. v. Ayala Ayala
289 F.3d 16
April 29, 2002

SUMMARY: Where an arrested individual does not receive a probable cause determination within 48 hours, the burden is on the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.

FACTS: On April 28, 2001, Ayala participated in a campaign of civil disobedience aimed at disrupting live-fire artillery and bombardment exercises which the Navy periodically conducts in and around Vieques. Ayala was detained by military personnel at approximately 11:20 a.m. on April 28 and transported to a detention/processing center at Camp Garcia (on Vieques), where he was searched, questioned, and photographed. The next morning Ayala was transported by boat to Roosevelt Roads, a naval installation on the main island of Puerto Rico, where he was again searched, questioned, and photographed. Late on Sunday night, April 29, Ayala was moved to the Metropolitan Detention Center in Guaynabo. Approximately 51 hours after his initial detention, some time after 2:00 p.m. on April 30, Ayala was taken before a magistrate.

ISSUE: Should the information against Ayala have been dismissed because the government failed to take him before a magistrate within 48 hours of his arrest?

HELD: No.

DISCUSSION: Federal Rule of Criminal Procedure 5(a) states, in pertinent part, that "any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge." Although Rule 5(a) does not specify what would constitute an "unnecessary delay," courts have construed the Fourth Amendment as imposing a presumptive 48-hour time limit on detentions in the absence of a probable cause determination. "Where an arrested individual does not receive a probable cause determination within 48 hours," the burden is on the government "to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

181 individuals had been arrested in the "wave" of trespassers which included Ayala. This occurred on a naval base on an island off the coast of Puerto Rico and was executed in the midst of a military exercise. That large number of detainees, and the transportation required to get them before a Magistrate, constituted "extraordinary circumstances" that warranted an exception to the 48-hour rule.

The Court also noted the absence of any claim of prejudice arising out of Ayala's detention beyond 48 hours.

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2nd CIRCUIT

U.S. v. Lawes
292 F.3d 123
May 31, 2002

SUMMARY: Reasonable suspicion is not a high threshold, and the "requisite level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence." Thus, notwithstanding some differences in the description between the suspect and appellant, the match between the two men was, under the circumstances, close enough to justify a reasonable suspicion.

FACTS: On the night of January 1, 2000, New York City Detectives Martin and Bencivengo were in an unmarked police car looking for a murder suspect. They possessed a mugshot of the suspect and pedigree information that described him as a twenty year-old black male, weighing 160 pounds and being 5'9" tall, with a visible scar on one arm. As they drove through the Parkchester section of the Bronx, Martin spotted Lawes walking on a sidewalk approximately one block from where the murder had taken place. Lawes was thirty-four years old, weighed 200 pounds, and was 6'1" in height. Furthermore, unlike the suspect, he had no scar on his arm but did have a scar on his face, under his right eye. Martin and Bencivengo had been informed by some sources that their suspect was 6', rather than 5'9", tall. From his viewpoint in the car, Martin believed that Lawes closely matched the picture of the suspect. Martin then alerted Bencivengo, who agreed that Lawes might be the suspect.

Martin stopped the car while still behind Lawes, and Bencivengo got out to follow Lawes on foot. Martin then drove the car past Lawes and parked. Martin got out of the car, approached Lawes, and identified himself as a police officer. He told Lawes that he would like to speak with him and asked Lawes to put down a bag that he was carrying. As Lawes placed the bag on the ground, he turned his body so that his right hand was no longer visible to Martin. This alarmed Martin, and he reached around Lawes to grab his arm. In doing so, Martin felt a hard object near Lawes' waist that felt like the butt of a gun. Martin shouted a warning codeword to Bencivengo, and they subdued and handcuffed Lawes. Martin and Bencivengo thereafter retrieved a loaded gun from Lawes' waistband. The two detectives realized that Lawes was not the murder suspect only after taking him into custody.

ISSUE: Did the facts as known by the detectives justify reasonable suspicion to detain and frisk Lawes?

HELD: Yes.

DISCUSSION: Reasonable suspicion is not a high threshold, and the "requisite level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence." Thus, notwithstanding some differences in the description between the suspect and appellant, the match between the two men was, under the circumstances -- nighttime and a person in a heavy coat -- close enough to justify a reasonable

suspicion.

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5th CIRCUIT

U.S. v. Green
2002 U.S. App. LEXIS 11147
Decided June 11, 2002, with revised opinion issued June 14, 2002.

SUMMARY: Suspicionless stops of vehicles at checkpoints inside military installations in order to assure the military security of the installation are reasonable seizures in light of the Fourth Amendment and the Supreme Court's holding in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

FACTS: Defendant was driving a car across Fort Sam Houston in San Antonio, Texas, late one night when she came upon a roadblock checkpoint marked with flares, signs and cones and operated by uniformed military police (MP). Fort Sam Houston is an "open" military post, and the checkpoint was located inside the post on an avenue commonly used to traverse the post. Consistent with their written standing operating procedure (SOP) for this "Force Protection Vehicle Checkpoint," MP directed every sixth vehicle, including defendant's, into a parking lot next to the avenue.

"Operating at all times in accordance with the SOP," MP asked for her license and insurance data. She had neither, thereby violating Texas law. She tried to flee when MP asked her to get out of the car. After her arrest, the car was impounded and nine rocks of crack cocaine were found in a bag on the front seat during an inventory of the car's contents.

Defendant's motion to suppress the drugs as the fruit of an illegal seizure of the car was denied. She pled guilty, was convicted of possession with the intent to distribute crack cocaine, and sentenced to 24 months of imprisonment and a four-year term of supervised release.

ISSUE: Will vehicle checkpoints conducted to protect military installations satisfy the Fourth Amendment's reasonableness standard in light of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000)?

HELD: Yes.

DISCUSSION: "A checkpoint-type stop of an automobile is a seizure.... A suspicionless seizure is ordinarily unreasonable and therefore a violation of the Fourth Amendment. The Supreme Court has upheld suspicionless stops of vehicles at immigration and sobriety checkpoints, and suggested that... discretionless stops designed to check a driver's license and registration are permissible.… The Supreme Court recently held in *Edmond* that a narcotics checkpoint violated the Fourth Amendment because its 'primary purpose' was indistinguishable from the 'general interest in crime control.' 'Consistent with this suggestion, each of the checkpoint programs that [the Supreme Court has] approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring highway safety.' To be valid a checkpoint must reach beyond

general crime control—either targeting [1] a special problem such as border security or [2] a problem peculiar to the dangers presented by vehicles."

In the court's view, both of these further considerations were present in this case. Thus, the court concluded that the checkpoint and seizures met goals beyond generalized criminal enforcement. First, it found the special challenges of securing military installations "akin to the policing of our borders." Second, given the prevalence of car bombs as a terrorist weapon of choice and the attractiveness of military targets to terrorists, the checkpoints helped address "a problem peculiar to the dangers presented by vehicles."

Like the governmental interests in the security of its borders and the safety of its highways, the security of military installations will generally justify suspicionless vehicle seizures incident to checkpoint operations.

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7th CIRCUIT

U.S. v. French
2002 U.S. App. LEXIS 9978
May 28, 2002

SUMMARY: Curtilage. Those areas to which the public has general access, and where there are no barriers, obstructions or "no trespassing" signs to limit the public's access were located outside the curtilage of the home.

FACTS: Probation Officer Kelly went to defendant French's property looking for Hensley, a parolee. When he arrived at French's residence, Kelly pulled onto an open gravel driveway. There were no gates, fences, or barricades obstructing or otherwise preventing the public from entering upon the driveway from the public road, nor were there any "no trespassing" signs posted on or around the drive. The structures on the French's property, which were in plain view, consisted of a mobile home or trailer, which French used as a residence, a shed connected to a "lean-to," a three-sided structure that was partially covered by a shredded tarp on the one open side (serving as a curtain to hide the interior from view), and a second shed. The shed and lean-to were located at the south end of the drive, opposite the trailer, and faced west. The trailer faced the shed and lean-to structure and a gravel walkway approximately 20 feet in length connected the two structures. A second gravel walkway connected the trailer and the second shed, located in the southwest corner of the property. A brick and gravel walkway led from the drive to the front door of the trailer.

Kelley walked up a gravel walkway to the shed and asked the person inside to come out. As he emerged, Kelley became aware of a strong chemical odor emanating from the shed and was able to observe items used in the manufacture to methamphetamine inside the shed. A subsequent search yielded drug paraphernalia and illegal firearms.

French moved to suppress the evidence seized alleging that Kelly invaded the curtilage of his home,

and thus violated the Fourth Amendment.

ISSUE: Was the gravel walkway from which Kelly made his observations within the curtilage of French's residence and, therefore, protected by the Fourth Amendment?

HELD: No.

DISCUSSION: A curtilage line is not necessarily the property line, nor can it be located merely by measuring the distance separating the home and the area searched. Instead, a home's "curtilage" is the area outside the home itself but so close to and intimately connected with the home and the activities that normally go on there that it can reasonably be considered part of the home. For example, a barn located sixty feet from a home, which is kept locked and inaccessible to the general public, may be within a home's curtilage, but garbage placed in a garbage can that abuts the home is not. Thus whether an area is within a house's curtilage depends not only on proximity to the house but also on the use of the area and efforts to shield it from public view and access as well as the nature for which it is used.

In *United States v. Dunn*, 480 U.S. 294, 302- 03 (1987), The Supreme Court announced a four-factor inquiry to determine whether an area is within the curtilage of a home:
[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

In applying these factors, the trial court found that the walkway was not within an enclosed area surrounding the trailer and that French had failed to take any steps to protect the area from observation by passersby. To the contrary, evidence was that the general public made use of the area to engage in the hobby of automotive repair. The trial court further found that the walkway was not so intimately related to the activities of the home itself to be placed under the umbrella of Fourth Amendment protection. Accordingly, the trial court ruled that the gravel walkway fell outside the home's curtilage and that Probation Officer Kelly's observations were not made in violation of the Fourth Amendment.

French advanced several unconvincing theories in his argument that the gravel walkway, from which Probation Officer Kelly made his observations of the shed and lean-to structures, was within the curtilage of his home. Initially, French argued that because the walkway was within twenty feet of the home it was of sufficient proximity to the home to be within its curtilage. French next quibbled with the trial court's findings that he failed to take steps to protect the area from observation by the public and argues that the public did not have access to drive. Finally, French argued that the walkway was used for a purpose consistent with home-life, and therefore should be considered to be within the curtilage of the home.

In rejecting French's arguments, the Court stated that the proximity to the home, standing by itself, does not per se suffice to establish an area as within the curtilage. A curtilage line "cannot be located merely by taking measurements from some other case or precedent and then by use of a tape measure trying to determine where the curtilage is in a different case." Accordingly, while the proximity of the walkway to the house may be a factor to be considered in deciding whether it is within the home's curtilage, it is but one of several factors to be applied.

The walkway was neither enclosed nor shielded from the public in any way. The probation officers testified that here were no gates, barriers, or "no trespassing" signs that prevented people from viewing and using the gravel walkway. Further, from Kelly's point of view, several members of the public had access to the walkway, and were using it freely on the occasions when he was present on the property. Indeed when Kelly arrived there were no less than three (3) persons on French's property.

The Court cited previous cases which held that: public drives, sidewalks, or walkways (even those which lead to a rear side door) are not within the curtilage of the home when they are not enclosed by a gate or fence, and; the route which any visitor or delivery man would use is not private in the Forth Amendment sense, and thus if police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open.

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U.S. v. Gajo
290 F.3d 922
May 20, 2002

SUMMARY: Coconspirator statements made during the course of a conspiracy and in furtherance the conspiracy are admissible under FRE 801(d)(2)(E). Concealment is actually one of the main criminal objectives of an arson-for-profit scheme, because it facilitates the primary objective of fraudulently acquiring insurance proceeds.

FACTS: Gajo owned a business called Cragin Sausage which was in financial trouble. On January 16, 1996, the building where Cragin Sausage was located caught fire. After the fire was safely extinguished, Daniel Cullen, who worked in the Fire Department's Office of Fire Investigation, examined the property and concluded that the fire was deliberately set. Approximately one week after the fire, Gajo submitted an insurance claim for the damage at Cragin Sausage. The insurance company eventually denied Gajo's claim.

The investigation led to an individual named Smith who agreed to cooperate and told the investigators that a former coworker, Baumgart, had introduced him to Gajo. According to Smith, Gajo paid him $4,000 to burn down Cragin Sausage.

Approximately 10 months after the fire, Smith contacted Baumgart at the direction of a federal ATF agent. Smith and Baumgart engaged in two conversations, each of which was recorded and ultimately introduced into evidence. On the first tape, Baumgart responded to Smith's probing about what he should say to an agent questioning him about the fire at Cragin Sausage. Baumgart instructed Smith what to say. In the second conversation, which occurred several minutes later, Baumgart instructed Smith how to respond if investigating agents asked who set the fire.

ISSUE: Are Baumgart's statements admissible as coconspirator statements?

HELD: Yes.

DISCUSSION: To justify admission of coconspirator statements under FRE 801(d)(2)(E), the government

must present evidence that a conspiracy was in progress at the time of the conversation and that the statements were made "in furtherance of" the conspiracy.

The court first addressed whether the conspiracy existed at the time of the tape recorded statements. Generally, once the coconspirators achieve the goals of the conspiracy, statements concerning acts of concealment (or to avoid punishment) are inadmissible. However, this principle does not extend easily to the arson-for-profit context where the primary goal of a conspiracy involving arson is not only to destroy a building by fire, but also to obtain the insurance proceeds. In other words, unlike most other criminal conspiracies, concealment is actually one of the main criminal objectives of an arson-for-profit scheme, because it facilitates the primary objective of fraudulently acquiring insurance proceeds.

The court found there was sufficient evidence to find that the conspiracy to obtain insurance proceeds was ongoing 10 months after the fire.

The court next addressed whether Baumgart's statements were "in furtherance of" the conspiracy--an inquiry that required examination of the statements' content. Statements are "in furtherance of" the conspiracy when they promote the conspiracy's objectives, i.e., when the statements are "part of the information flow between conspirators to help each perform a role." Because Baumgart's statements reflect an attempt to avoid detection, he was furthering one of the conspiracy's goals.

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8th CIRCUIT

U.S. v. Axsom
289 F.3d 496
May 6, 2002

SUMMARY: Federal agents executed a search warrant at defendant's residence. Upon entering, the agents found the residence to be a veritable arsenal of weapons. Defendant was not allowed to get his own glass of water and was followed wherever he went inside his residence. A reasonable person would have realized the agents escorted him not to restrict his movement, but to protect themselves and the integrity of the search. Therefore, defendant was not in custody for purposes of *Miranda.*

FACTS: On March 3, 1999, federal agents executed a search warrant on Axsom's residence. Upon entering, agents observed dogs and numerous weapons, including fifteen shotguns and rifles lying on a kitchen table, another loaded firearm, three Samurai swords, and dozens of display knives and other guns hanging on the walls.

Once the dogs and weapons were secured, an agent explained that they had a search warrant to search for pornography. The agent told him that he was not under arrest and also that she was interested in speaking with Axsom.

Execution of the search warrant took approximately two hours. During this time, two agents interviewed Axsom, and he responded to the questions. No *Miranda* warnings were given. Agents escorted Axsom to the bedroom to dress. He was not allowed to get his own glass of water and was followed wherever he went inside his home. The agents' only concern with Axsom's movements was his obtaining any of the numerous weapons spread throughout the house. Axsom was not arrested following the search.

Following his indictment, Axsom moved to suppress inculpatory statement made during the interview.

ISSUE: Was Axsom's interrogation "custodial" requiring proper *Miranda* warnings and waiver?

HELD: No.

DISCUSSION: The rule in *Miranda* requires that any time a person is taken into custody and questioned, a law enforcement officer must, prior to questioning, advise the individual of his *Miranda* rights and obtain a valid waiver.

Whether or not a person was in custody depends on whether a reasonable person in the same circumstances would feel that his freedom of movement was restricted to the degree associated with formal arrest. The court, citing *U.S. v. Griffin,* 922 F.2d 1343 (8th Cir.1990), applied six common indicia regarding the issue of custody: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that he was free to leave, or request the officers to leave, or that he was not considered to be under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether "strong arm" tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

Regarding the first factor, the court found that the agents had informed the defendant that he was not under arrest.

As to the second factor, the court found that the defendant was not permitted to move about at will during the interview. Although agents did restrain Axsom's freedom of movement, it was not to a "degree associated with formal arrest." He was not handcuffed, nor was he confined to one room. He secured his dogs outside; he entered his bedroom to obtain clothing; he sat in the living room; and he used his bathroom.

Given the extensive arsenal of weapons discovered in Axsom's house, the court found the restraint on his freedom of movement to be a much less significant factor. A reasonable person in Axsom's shoes should have realized the agents escorted him not to restrict his movement, but to protect themselves and the integrity of the search.

In considering the third factor, the court found that the defendant voluntarily acquiesced to requests by federal agents to answer questions.

Turning to the fourth factor, the court found that the agents did not employ strong arm tactics or deceptive stratagems. Although armed, the agents did not adopt a threatening posture toward Axsom, display their weapons, or make a physical show of force during the questioning.

The fifth factor looks at whether the atmosphere of the questioning was police dominated. While nine agents participated in the execution of the search warrant, only two agents conducted the interview. During the interview, Axsom sat on an easy chair and smoked his pipe, while the two agents sat across from him on a small sofa. The time of the questioning reflected a more casual scene than a police dominated, inherently coercive interrogation. Interrogation of a suspect in the comfort and familiarity of his home is less likely to be custodial.

As to the sixth factor, Axsom was not arrested at the conclusion of the interview.

The court held that under the circumstances here, a reasonable person would have felt he was at liberty to terminate the interrogation and walk away or turn his back on the agents.

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9TH CIRCUIT

Michael A. Newdow v. US Congress, et al.
2002 U.S. App. LEXIS 12576
June 26, 2002

SUMMARY: The words "under God" in the Pledge of Allegiance violate the Establishment Clause of the First Amendment by conveying a message of state endorsement of monotheistic beliefs.

FACTS: Michael Newdow, the Plaintiff-Appellant, is an atheist whose daughter attended a California public school. In accordance with state law and a school district rule, the schoolteachers began each school day by leading their students in appropriate patriotic exercises, which included saying the Pledge of Allegiance [hereinafter the Pledge]. The Pledge, as recited, reads "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. §4 (1998). The words "under God" were added by a 1954 amendment to the Pledge.

Newdow claims his daughter was injured when she was compelled to "watch and listen as her state-employed teacher in her state-run school lead her classmates in a ritual proclaiming that there is a God, and that ours [sic] is 'one nation under God.'" Newdow challenged the Pledge as it reads, the California statute, and the school district's policy as a violation of the Establishment clause of the First Amendment. Newdow's case was dismissed by a magistrate judge on the grounds that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." The District judge approved the

recommendation and entered a judgment for dismissal. The appeal to the 9th Circuit followed.
ISSUE: Does the current version of the Pledge of Allegiance, which includes the words "under God," and the daily recitation of this amended version in the public school classroom lead by a public school teacher, violate the Establishment Clause of the First Amendment to the United States Constitution?

HELD: Yes.

DISCUSSION: The Establishment Clause of the First Amendment states the "Congress shall make no law respecting an establishment of religion." The 9th Circuit Court found that in the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. The Court states that it is a profession of a religious belief, namely a belief in monotheism. The Court said that the words "under God" are not merely an acknowledgement that many Americans believe in a deity, nor are they merely a description of the historical significance of religion in the founding of our Republic. Rather, the phrase "one nation under God" represents swearing an allegiance to the values for which the flag stands, namely, unity, indivisibility, liberty, justice and monotheism. The Court also states that although students cannot be forced to participate in the recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of the current Pledge.

The Court went on to say that in its current form, the Pledge is an impermissible government endorsement of religion because it sends a message to unbelievers that "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984). The 9th Circuit Court says that the Pledge places students in the untenable position of choosing between participating in the exercise with religious content or protesting. To an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it appears to be an attempt to enforce the religious orthodoxy of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Court concluded that listening to the Pledge every day had a coercive effect.

Finally, the Court looked to the legislative history of the Pledge, as amended, and concluded that the 1954 amendment to the Pledge had the sole purpose of advancing religion, in order to differentiate the United States from nations under communist rule. Even though the express language of the 1954 Act disclaims a religious purpose, the 9th Circuit Court dismissed this language as "irrelevant" and concluded that the Act results in the endorsement of religious beliefs. The Court concludes that within the confined environment of the classroom, the Pledge is highly likely to convey an impermissible message of endorsement to some and disapproval of others of their beliefs regarding the existence of a monotheistic God.

(The Court has issued a Stay on its Order to allow for reconsideration and/or appeal to the Supreme Court.)

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10th CIRCUIT

U.S. v. Sparks
291 F.3d 683
May 24, 2002

SUMMARY: The events leading up to the defendant's arrest, when combined with the officer's experience, are enough to provide the requisite link between a defendant's residence and his drug activities elsewhere. Therefore, probable cause existed to authorize a search of defendant's residence.

FACTS: A 911 caller reported a suspicious package wrapped in plastic at a particular point along a roadside. Police seized the package and tested its contents. It contained a pound of methamphetamine. Police replaced the package with a decoy package and kept the area under surveillance. The defendant drove up, walked directly to the package, picked it up without any attempt to examine it, and returned immediately to his truck. He was arrested as he began to drive away. Defendant's house was within eyesight of the location of the package.

In the affidavit for the search warrant for defendant's home, the police officer stated that, in his experience, it is common for drug dealers to keep paraphernalia and records of their illegal activity in their residences.

ISSUE: Is an officer's general experience with drug investigation enough to supply the requisite link between a defendant's residence and his drug activities elsewhere?

HELD: Yes.

DISCUSSION: Given the large quantity of methamphetamine found in the bag, and given the defendant's apparent connection with the bag (in light of his actions in retrieving the decoy package), it was reasonable to conclude that the defendant was involved in the distribution of the drug. In turn, it was reasonable to conclude that there was a fair probability that additional evidence of crime (e.g., drug paraphernalia and/or sales records) would be found in defendant's nearby residence.

*****

11th CIRCUIT

U.S. v. Holloway
290 F3d 1331
May 10, 2002

SUMMARY: In validating a warrantless search based on the existence of an emergency, the government must demonstrate both exigency and probable cause. In an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger. When an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller. Once in the home, police officers may seize any evidence found within plain view.

FACTS: A 911 operator dispatched a patrolman to investigate a report of gunshots and arguing from a certain residence. Shortly thereafter, the patrolman received a second dispatch from the 911 operator informing him that the anonymous caller reported continuing gunshots and arguing. The patrolman arrived at the designated address a minute later.

Upon pulling into the driveway, the patrolman saw Defendant and a woman on the front porch. The officer drew his weapon and ordered the two to raise their hands. While the Defendant complied immediately, the woman did so only after the patrolman threatened to use pepper spray. The patrolman and a backup officer saw a child inside the house. After the Defendant was handcuffed and placed in the officer's vehicle, the patrolman approached the residence to check for victims and weapons.

As the patrolman stepped onto the porch, he then saw a shotgun leaning against the side of the mobile home, approximately three feet from where the Defendant had been standing. Then, he spotted two expended shotgun shells on the grass by the side of the residence. Defendant admitted he discharged the shotgun and was ultimately convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g).

ISSUE: Were the anonymous 911 reports sufficient to establish probable cause of an emergency situation to allow the warrantless search of the private residence?

HELD: Yes.

DISCUSSION: The United States Supreme Court has crafted a few, narrow exceptions to the warrant requirement of the Fourth Amendment. The exigent circumstances exception recognizes that a warrantless entry by police officers may be lawful when there is compelling need for official action and no time to secure a warrant. The exigent circumstances exception encompasses several common situations where resort to a magistrate for a search warrant is not feasible. These include danger of flight or escape, loss or destruction of evidence, risk of harm to the public or police, mobility of a vehicle, and hot pursuit. One of the most compelling events giving rise to exigent circumstances is an emergency situation. When such an exigent circumstance demands an immediate response, particularly where there is danger to human life, protection of the public becomes paramount and can justify a limited, warrantless intrusion into a home.

In validating a warrantless search based on the existence of an emergency, as with any other situation falling within the exigent circumstances exception, the government must demonstrate both exigency and probable cause. In an emergency, the probable cause element may be satisfied where officers reasonably believe a person is in danger. Once in the home, police officers may seize any evidence found within plain view.

In *Florida v. J.L.*, 529 U.S. 266 (2000), an anonymous caller reported a young man with a certain description, located in a certain place, carrying a firearm. Police made an investigatory stop of a person meeting the description supplied by the caller. During a pat-down of this man, a firearm was discovered and seized. The Court ruled that the seizure was unconstitutional because the anonymous tip lacked sufficient indicia of reliability.

In this case, however, the information supplied by the caller involved a serious threat to human life and concerned an on-going emergency requiring immediate action. In an exigent circumstance analysis, when an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller. In light of the emergency (possibly a wounded victim inside the residence, for example), the police officers need a lesser showing of reliability than was required in the *J.L.* case. Police officers must be given the authority and flexibility to act quickly, based on limited information, when human life is at stake. The fact that no victims are found, or that the information ultimately proves to be false or inaccurate, does not render the police action any less lawful. As long as the officers reasonably believe an emergency situation necessitates their warrantless entry, whether through information provided by a 911 call or otherwise, such actions must be upheld as constitutional.

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D.C. CIRCUIT

U.S. v. Wesley
2002 U.S. App. LEXIS 12282
June 21, 2002

SUMMARY: The search of a car without a warrant, was a permissible search incident to arrest where 1) based on Wesley's location, police had probable cause to believe Wesley was violating a stay-away order, and 2) because Wesley was in his car at the time of arrest, search of the passenger compartment was lawful in scope.

FACTS: Wesley was arrested near Stanton Road and Trenton Place, S.E. in Washington D.C. in June and again in October for possession of cocaine. After each arrest, he was released pending trial with the condition that he stay away from that intersection. Nevertheless, he was arrested there again in November for violating the previous "stay away" order. During the search incident to arrest of his vehicle, officers found a loaded pistol under the driver's seat and crack cocaine in the ashtray and trunk. He was charged with possession of cocaine with intent to distribute, carrying a firearm during the commission of a drug

trafficking offense, and possession of a firearm by a convicted felon. He moved to suppress the gun and drugs as evidence, arguing his arrest was unlawful and the search incident to his arrest exceeded the lawful scope.

ISSUES: a) Was it permissible to arrest the Wesley for violating a condition of his pre-trial release?

b) Was it permissible to search the passenger compartment incident to arrest even though the Wesley was secured in handcuffs and placed in the police car?

HELD: a) Yes.

b) Yes.

DISCUSSION: The intentional violation of a pretrial release order is a criminal offense under District of Columbia law.

Wesley tried to invoke an earlier D.C. Circuit Court of Appeals opinion in *U.S. v. Lyons*, 706 F.2d 321 (D.C. Cir. 1983), holding that the search of a closet in a hotel room after a suspect had been handcuffed and seated in a chair near the doorway was not a valid search incident to arrest because it was "inconceivable that [the defendant] could have gained access" to the closet. The Court refused to apply *Lyons* to this case, recognizing that in *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court clearly established a bright line rule which governs any search incident to arrest of motor vehicles: police may search the passenger compartment of an automobile incident to the lawful custodial arrest of any occupant, even if the occupant has been removed and is no longer in the car at the time of the search.

The court further recognized *Belton* as establishing the principle that the area under a defendant's "immediate control" must be determined as of the time of the arrest rather than of the search.

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U.S. v. Oguaju
288 F.3d 448
June 21, 2002

SUMMARY: An inmate's request under the Freedom Of Information Act for all records held by the U.S. Marshal concerning an escaped convict turned informant, whose testimony had helped to convict appellant, was properly denied where disclosure would not serve a public interest that outweighs the informant's privacy interest.

FACTS: An inmate in a federal prison requested under the Freedom of Information Act all records on file with the United States Marshals Service concerning Powell, an escaped convict turned government informant, whose testimony had helped to convict him. The Marshals Service refused to confirm or to deny the existence of such records and asserted that, if they do exist, they "would be exempt from disclosure pursuant to exemption 7(C) of the [FOIA]" - the exemption for law enforcement records the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). After exhausting his administrative remedies, the inmate filed a complaint in the district court, which granted summary judgment to the Marshals Service.

ISSUE: Did the informant's privacy interest outweigh the public interest needed to overcome exemption 7(c)?

HELD: Yes.

DISCUSSION: The inmate argued that Powell himself already disclosed the relevant information when he testified at trial, but the inmate was not requesting a transcript of Powell's testimony. Instead he was requesting something entirely different: "Any and all information in [the Marshals Service's] file that deals directly or indirectly with David Powell ... includ[ing] investigative reports of Mr. Powell's escape from prison." Since Powell's privacy interest in that request, however slight, outweighed the public interest, the Marshall's Service did not have to disclose the information.